Silvers v. Google, Inc. Doc. 7

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CASE NO. 1:06-CV-02658-WMN

STEVEN A. SILVERS, an individual,

Plaintiff,

v.

GOOGLE INC., a Delaware corporation,

Defendant.
_______________________________________/

US District Court for the Southern District of Florida West Palm Beach Division

Case No. 05-80387-CIV-RYSKAMP/VITUNAC

GOOGLE INC., a Delaware corporation,

Counterclaimant,

v.

STEVEN A. SILVERS, an individual; STELOR PRODUCTIONS, INC., a Delaware Corporation; STELOR PRODUCTIONS, LLC, a Delaware limited liability company, and STEVEN ESRIG, an individual,

Counterdefendants.
_______________________________________/

STELOR PRODUCTIONS, LLC'S OPPOSITION TO LINDSEY MILLER'S MOTION TO QUASH SUBPOENA AND FOR PROTECTIVE ORDER

Stelor Productions, LLC ("Stelor"), by and through undersigned counsel, hereby opposes on the following grounds the Motion to Quash Subpoena and for Protective Order filed by Lindsey Miller:

Introduction

Stelor has subpoenaed documents and deposition testimony from a former employee, Lindsey Miller, in connection with an action pending in the Southern District of Florida. A true

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and correct copy of the Subpoena is attached as Exhibit "A" hereto. After Ms. Miller was properly served with the subpoena (*see* Exhibit "B" hereto), Stelor was contacted by her counsel, who advised that Ms. Miller would appear for deposition if the date was changed (*see* Email communications attached as Exhibit "C" hereto). Notwithstanding that representation, counsel then filed a motion to quash the subpoena and for protective order, refusing to appear at all for the deposition or to produce any documents.

Ms. Miller's refusal to comply with the Subpoena is unfounded and improper. The Motion should be denied, and Ms. Miller compelled to produce documents and appear for deposition immediately.

Indeed, as Ms. Miller's Motion confirms, her counsel also represents Steven Silvers, the party to which Stelor is adverse in the Florida Action. Clearly, Ms. Miller's sole purpose in filing an otherwise unfounded Motion was to assist Silvers in his efforts to obstruct Stelor's discovery. That strategy is not only transparent, it is improper. For this reason, Stelor cross-moves for sanctions.

THE FLORIDA ACTION

The Florida Action involves two disputes regarding a set of children's characters called the Googles. The characters were created by Steven Silvers and are based on a book he wrote, "Googles and the Planet of Goo".

Pursuant to a written License Agreement dated June 2002, Mr. Silvers granted an exclusive license in all aspects of that intellectual property to Stelor. Mr. Silvers, however, improperly attempted to terminate the License Agreement in April of 2005. Stelor was forced to file a lawsuit, seeking a declaration that the termination was improper and the License

BURLINGTON · SCHWIEP · KAPLAN & BLONSKY, P.A.
OFFICE IN THE GROVE PENTHOUSE 2699 SOUTH BAYSHORE DRIVE MIAMI, FLORIDA 33133
T: 305.858.2900 F: 305.858.5261
EMAIL: INFO@BSKBLAW.COM WWW.BSKBLAW.COM

Agreement remains in effect. That claim is pending in the Florida Action. A true and correct copy of Stelor's current pleading is attached hereto as Exhibit "D".

In addition, also as part of that Florida Action, Stelor has filed claims for trademark infringement against the internet giant, Google Inc. Silvers has also filed parallel claims against Google Inc. for infringement. The "Googles" name is protected by a federal trademark registration that predates the trademark obtained by Google Inc. for its internet search engine. Google's recent expansion, including into the children's market where Stelor has been promoting the Googles' characters and name, infringes on the Googles trademark. The case is based on a reverse confusion theory. *See* Exhibit "D".

Trial is scheduled in the Florida Action for the period beginning December 11, 2006, on two aspects of the dispute: (1) the so-called contract claims between Stelor and Silvers related to Silvers' wrongful termination of the License Agreement, and (2) an initial argument by Google that the Googles federal trademark registration is invalid for certain technical reasons. *See* Trial Order, Exhibit "E" hereto.

Stelor subpoenaed Ms. Miller because Silvers has indicated that she has information related to the contract dispute with Stelor. He confirmed that at his deposition last week, and indicated that he intended to call Ms. Miller as a witness at trial. Accordingly, Stelor is entitled to find out what she knows and has to say.

Mr. Silvers, unfortunately, has repeatedly attempted to avoid discovery obligations in the Florida Action. He refused to appear when Stelor initially noticed him for deposition months ago, instead filing a motion for protective order. When that motion was denied, and counsel coordinated a new date for Mr. Silvers' to appear for deposition, he again refused to attend.

BURLINGTON · SCHWIEP · KAPLAN & BLONSKY, P.A.
OFFICE IN THE GROVE PENTHOUSE 2699 SOUTH BAYSHORE DRIVE MIAMI, FLORIDA 33133
T: 305.858.2900 F: 305.858.5261
EMAIL: INFO@BSKBLAW.COM WWW.BSKBLAW.COM

Stelor was forced to file an expedited motion, and Silvers was once more explicitly ordered to appear for deposition. *See* Omnibus Order dated October 5, 2006, Exhibit "F" hereto. That order also expressly permitted Stelor to proceed with other depositions noticed during that period, including this deposition of Ms. Miller pursuant to the Subpoena.

THE MARYLAND STATE COURT ACTIONS

In an apparent effort to confuse the issues, Ms. Miller references another pending action in Maryland state Court, *Stelor Productions, LLC v. Lindsey R. Miller*, Case #272024-V, in the Circuit Court for Montgomery County, Maryland ("Maryland Action"). The Maryland Action was filed by Stelor to address misconduct by Ms. Miller in connection with the termination of her employment at Stelor. The Maryland Action is entirely independent of the Florida Action, and has nothing directly to do with the termination of the License Agreement at issue in the Florida Action. A true and correct copy of the complaint in this Maryland action is attached hereto as Exhibit "G".

ARGUMENT

Ms. Miller's seeks to quash the Subpoena and prevent ANY deposition, based on a set of procedural issues that are entirely unfounded. She has not made specific objections to the documents requested, and although vaguely referencing the attorney-client privilege, she includes no log of any documents withheld on that basis. This is a clear effort to avoid a basic discovery obligation, patently to assist Mr. Silvers, which should not be tolerated. The Motion should be denied, and sanctions assessed.

The procedural issues are addressed in turn:

BURLINGTON · SCHWIEP · KAPLAN & BLONSKY, P.A.
OFFICE IN THE GROVE PENTHOUSE 2699 SOUTH BAYSHORE DRIVE MIAMI, FLORIDA 33133
T: 305.858.2900 F: 305.858.5261
EMAIL: INFO@BSKBLAW.COM WWW.BSKBLAW.COM

1. Miller Claims the Subpoena is "Deficient and Lacks Authority".

Miller claims the Subpoena is somehow deficient because it was served without Florida court approval. Rule 45(a)(3)(B), Fed. R. Civ. P., expressly permits the issuance of subpoenas by an attorney on behalf of "a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice." The Subpoena here was properly issued and clearly authorized pursuant to the Rule. Miller's suggestion that some type of formal approval was required from the Florida court is entirely unfounded.

Miller's contention that the orders issued by the Florida Court somehow release her from complying with the Subpoena is also ludicrous. The Court's October 5, 2006 Omnibus Order (Exhibit "F") resolved any conceivable doubt – and there could not legitimately have been any – about Stelor's right to depose Ms. Miller pursuant to the Subpoena. The Order holds that Stelor's "Motion for Order Confirming Stelor may Proceed with Depositions it Previously Agreed to Schedule for October 9-11 to Accommodate the Schedule of Mr. Silvers is hereby GRANTED." Ms. Miller's depositions, of course, was one of those.

Mr. Silvers gambled – and lost – that he could avoid being deposed in the Florida Action. Ms. Miller, apparently, placed a side bet on that wager. (Silvers, figuratively speaking, no doubt gave her the money to bet). This Court should confirm that she lost too.

2. Miller Claims the Subpoena Failed to Allow Reasonable Time for Compliance.

The Subpoena was issued on September 22, 2006. Ms. Miller was served on Monday, October 2, 2006. *See* Exhibit "B". The deposition was scheduled for the following week, on

BURLINGTON · SCHWIEP · KAPLAN & BLONSKY, P.A.
OFFICE IN THE GROVE PENTHOUSE 2699 SOUTH BAYSHORE DRIVE MIAMI, FLORIDA 33133
T: 305.858.2900 F: 305.858.5261
EMAIL: INFO@BSKBLAW.COM WWW.BSKBLAW.COM

Tuesday, October 10, 2006. Accordingly, Ms. Miller had more than a week's notice for the deposition, which is certainly reasonable time for compliance.

Nor does – or could – Miller point to any substantial prejudice caused her by the timing of the Subpoena and deposition. Her so-called timing concerns are totally illegitimate.

Essentially, Miller argues that she and her counsel require additional time to assess the claims and issues pending in the Florida Action, in order to determine "if Miller's knowledge has any relevance to those issues". That is not a proper basis for moving to quash the Subpoena. Stelor is entitled to conduct discovery calculated to lead to admissible evidence. Relevance is ultimately to be determined by the Court (in the Florida Action), and is not a proper basis for objecting to questions at a deposition, let alone moving to quash a Subpoena and prevent a deposition entirely. This is especially the case here, where Mr. Silvers has himself repeatedly claimed that Ms. Miller has relevant information and will be called as a witness at trial in the Florida Action. Indeed, a critical reason for Stelor to take this deposition is to confirm whether or not Ms. Miller in fact has any relevant information.

In addition, Ms. Miller complains that Stelor may attempt to use her deposition in the pending Maryland Action. The deposition, however, has not been noticed in connection with the Maryland Action, and as set forth above, is being taken in connection with the Florida Action. Whether the deposition could or would be used in the Maryland Action is something for the Court in that Action to decide.

Accordingly, the Motion should be denied.

BURLINGTON · SCHWIEP · KAPLAN & BLONSKY, P.A.
OFFICE IN THE GROVE PENTHOUSE 2699 SOUTH BAYSHORE DRIVE MIAMI, FLORIDA 33133
T: 305.858.2900 F: 305.858.5261
EMAIL: INFO@BSKBLAW.COM WWW.BSKBLAW.COM

2. Ms. Miller Claims Stelor Seeks Attorney-Client Privileged Documents.

Finally, although Ms. Miller served no formal response to the Subpoena's document requests, her motion claims that she has no information about certain categories of the document request. That is enough to address, either indicating in a response to the request that she has no responsive documents or by explaining that at the deposition. It is certainly not a basis for moving to quash the Subpoena.

Similarly, if Ms. Miller believes that otherwise responsive documents are privileged, then she should object to the request on that basis and provide a log of the documents. Again, that is not a basis for moving to quash the Subpoena.

The substance of Ms. Miller's argument is also revealing. She admits that her counsel also represents Silvers, at least in the Maryland action. Clearly, Ms. Miller's purpose in filing the Motion was to assist Silvers by making Stelor jump through hoops to depose the witnesses Silvers himself plans on calling to testify at trial in the Florida Action. That strategy is not only transparent, it is improper.

CROSS MOTION FOR SANCTIONS

For these reasons, moreover, Ms. Miller's unfounded Motion to Quash should not only be denied, but sanctions should be assessed against her to cover the costs Stelor has incurred in having to address this baseless motion. The Motion was obviously filed for no good reason, other than to assist Silvers in obstructing discovery in the Florida Action. As such, it should be denied, and sanctions should be assessed accordingly.

Respectfully submitted,

BURLINGTON, SCHWIEP,
KAPLAN & BLONSKY, P.A.

BURLINGTON · SCHWIEP · KAPLAN & BLONSKY, P.A.
OFFICE IN THE GROVE PENTHOUSE 2699 SOUTH BAYSHORE DRIVE MIAMI, FLORIDA 33133
T: 305.858.2900 F: 305.858.5261
EMAIL: INFO@BSKBLAW.COM WWW.BSKBLAW.COM

Counsel for STELOR PRODUCTIONS, LLC
Office in the Grove, Penthouse A
2699 South Bayshore Drive
Miami, Florida 33133
Tel: 305-858-2900
Fax: 305-858-5261
Email: kkaplan@bskblaw.com
dzack@bskvlaw.com

s/s Kevin C. Kaplan

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2006, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the Mailing Information for Case No.1:06-CV-02658-WMN. Counsel of record currently identified on the Mailing Information list to receive e-mail notices for this case are served via Notices of Electronic Filing generated by CM/ECF. Counsel of record who are not on the Mailing Information list to receive e-mail notices for this case have been served via U.S. Mail.

By: /s/ Kevin C. Kaplan
Kevin C. Kaplan